SUPREME COURT, U. S.

FILED

JAN 7 1971

E. ROBERT SEAVER, CLERK

PETITION FOR CERTIORARI

IN THE

SUPREME COURT OF THE UNITED STATES

No. 1206

LEONARD VAUGHT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, LEONARD VAUGHT, hereby petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit which decision affirmed petitioner's

Court after trial by jury.

OPINIONS BELOW

The Per Curium opinion of the United States Court of Appeals for the Ninth Circuit is reproduced and appended hereto as Appendix "A".

JURISDICTION

The judgment sought to be reviewed was made and entered on November 12, 1970. Timely petition for rehearing was denied December 7, 1970.

The statutory provision believed to confer jurisdiction to review the judgment in question is 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether it violates petitioner's right against self incrimination preserved by the Fifth Amendment to the United States Constitution to convict petitioner in two counts of smuggling (dangerous drugs) and facilitating their transportation after entry and a third count of conspiracy to do the things alleged in the first two counts.

2. Whether it violates petitioner's right against cruel and unusual punishment preserved by the Eighth Amendment to the United States Constitution to convict petitioner of a separate charge of conspiracy to commit an offense when he is, at the same time, convicted of the substantive offense itself.

Amendment V, United States Constitution:

"...nor shall be compelled in any criminal case to be a witness against himself..."

Amendment VIII, United States Constitution:

"...nor cruel and unusual punishments inflicted."

STATUTES INVOLVED

18 U.S.C. Sec. 371:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

18 U.S.C. Sec. 545:

"Whoever knowingly and willfully, with intent to defraud the United

introduced into the United States any merchandise which should have been invoiced, or makes out or passes or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law -

Shall be fined not more than $10,000 or imprisoned not more than five years, or both."

STATEMENT OF CASE

A three count indictment was filed on April 30, 1969, by the United States Grand Jury, Southern Division of California, charging petitioner, LEONARD VAUGHT, and two others with: Smuggling and transporting merchandise (23,000 amphetemine tablets), 18 U.S.C. Sec. 545 (in two counts); and conspiracy to smuggle merchandise, 18 U.S.C. Sec. 371.

Petitioner, LEONARD VAUGHT, was found guilty of each count upon trial by jury. Petitioner was fined $1,000 and sentenced to 18 months imprisonment on each count, the fine being non-cumulative and the imprisonment to be concurrent.

VAUGHT, appealed the judgment to the United States Ninth Circuit Court of Appeals, docket number 25,499. On November 12, 1970, the Ninth Circuit Court of Appeals filed its Per Curiam decision [Appendix "A"] affirming the lower court's judgment. Timely petition for rehearing [Appendix "B"] was denied December 7, 1970.

Appellant hereby petitions the United States Supreme Court for a Writ of Certiorari to review the lower court's decision.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

(1) The subject decision below of the United States Court of Appeals for the Ninth Circuit has decided a federal question in a way in conflict with applicable decisions of this court.

The lower court rejects the applicability of the self incrimination rationale of Leary v. U. S. (1969) 395 U.S. 6 on the theory that the general customs and tariff laws which petitioner violated were imposed in essentially a noncriminal area and were designed to produce federal revenue.

Petitioner clearly comes within the rationale of Leary, supra., the lower court's theory fatally failing to recognize the totally criminal sanction for the proscribed conduct.

(2) The subject decision below also decided an important question of federal

law which has not been, but should be, settled by this court.

To allow a person to be convicted of a separate charge of conspiracy to commit an offense when he is, at the same time, convicted of the substantive offense itself is a form of "cruel and unusual punishment" and perhaps within the penumbra of "double jeopardy".

CONCLUSION

This court should grant certiorari, and the judgment below vacated and the conviction set aside.

Respectfully submitted,

DeCRISTOFORO & SULLIVAN

By: Daniel J. Sullivan

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

I am a citizen of the United States and a resident of the county aforesaid I am over the age of eighteen years and not a party to the within action; my business address is 901 F Street, Suite 240, Sacramento, California.

On the date set forth below, I served the within copy of PETITION FOR WRIT OF CERTIORARI on all the parties required to be served herein by serving the Respondent in said action, by placing three true copies thereof enclosed in a sealed envelope with Air Mail postage thereon fully prepaid, in the United States post office at Sacramento, California, addressed as follows:

SOLICITOR GENERAL
Department of Justice
Washington, D. C. 20530.

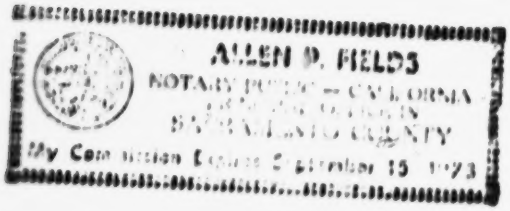
DATED: January 5, 1971.

Elena M Grimsley

Subscribed and sworn to before me this 5th day of January, 1971.

Allen D. Fields

Notary Public in and for said County and State.



UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 25,499
Plaintiff - Appellee,	[FILED
v.	Nov 12 1970
	Wm. B. Luck,
LEONARD VAUGHT,	Clerk]
Defendant - Appellant.	

Appeal from the United States District Court for the Southern District of California

Before: MERRILL and ELY, Circuit Judges, and *JAMESON, District Judge

PER CURIAM:

This is an appeal from a conviction on three counts of an indictment, the first count charging conspiracy to smuggle merchandise into the United States in violation of 18 U.S.C. §371 and 18 U.S.C. §545, the second count charging smuggling, and the third count, concealment and facilitating transportation and concealment, in violation of section 545, all counts alleging the importation of

*Honorable William J. Jameson, United States Senior Judge, Billings, Montana, sitting by designation.

23,000 amphetamine tablets without the merchandise having been presented for inspection, entered and declared as provided by 19 U.S.C. §§ 1459, 1461, 1484 and 1485.[1]

Appellant contends that the prosecution under section 545 violates his right against self-incrimination under the Fifth Amendment, because it requires him to give evidence which might be used against him in a state criminal prosecution. He argues that a manifest describing the merchandise would be available to California law enforcement officers pursuant to the Freedom of Information Act, 5 U.S.C. §552, making "it clear that 'self-incrimination' at least under California Health and Safety Code, (prohibiting the possession, possession for sale, or trnasportation of dangerous drugs) * * * is a very 'substantial risk'."

The same contention was rejected by this court in United States v. Perez 426 F.2d 799 (1970), involving the importation of seconal capsules in violation of section 545, the court pointing out that, "The general customs and tariff laws which Perez violated in failing to declare the seconal capsules were imposed in an essentially

---

1 Appellant was fined $1,000 and sentenced to 18 months imprisonment on each count, "the imprisonment portion of the sentence to be concurrent *** and the fine to be non-cumulative."

noncriminal area and were primarily designed to produce federal revenue."[2]

Appellant suggests that a different rule might apply with respect to the conspiracy charge. We do not agree. In any event, as noted supra, the sentences were concurrent. Accordingly any error in instructions would be immaterial since the evidence was sufficient to sustain the conviction on the other two counts.

Affirmed.

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2 The same contention was also rejected by this court in Witt v. United States, 413 F.2d 303 (1969) and United States v. Jetter, 421 F.2d 839 (1970), both cases holding that the statute proscribing smuggling of marijuana (21 U.S.C.§176a) did not violate defendant's privilege against self-incrimination.

ELY, Circuit Judge (Concurring):

While I concur in the result, I am hopeful that our court will soon reexamine the rule that permits a defendant to be convicted of a separate charge of conspiracy to commit an offense when he is, at the same time, convicted of the substantive offense itself. Some jurisdictions, including California, have abandoned that rule, and I think rightly so. See, e.g., In re Romano, 64 Cal. 2d 826, 415 P. 2d 798, 51 Cal. Rptr. 910 (1966); Cal. Penal Code § 654 (West 1957).

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, vs. LEONARD VAUGHT, Appellant.	)	No. 25,499

On Petition for Rehearing

Before: MERRILL and ELY, Circuit Judges, and JAMESON, District Judge

The petition for rehearing herein may be filed. Rehearing is denied.

[FILED
Dec 7 1970
Wm. B. Luck, Clerk]

APPENDIX B

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1206

LEONARD VAUGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of smuggling 23,000 amphetamine tablets into the United States, in violation of 18 U.S.C. 545, and of conspiracy to commit that offense, in violation of 18 U.S.C. 371. He was sentenced to concurrent prison terms of 18 months on each count and a noncumulative fine of $1,000. The court of appeals affirmed *per curiam* (Pet. App. A).

Petitioner contends that the requirement in 18 U.S.C. 545 that goods be invoiced before their entry into the United States violated his privilege against compulsory self-incrimination. As observed by the court below, this precise claim was advanced and rejected in *United States* v. *Perez*, 426 F. 2d 799 (C.A. 9), certiorari denied, October 12, 1970 (No. 5307, this Term). As the court of appeals pointed out in *Perez*, Section 545 is a general tariff and customs provision that is primarily a revenue measure and is not directed against a class inherently suspect of criminal activities. In these circumstances, the court of appeals properly ruled that the rationale of *Leary* v. *United States*, 395 U.S. 6, has no application. See also *United States* v. *Boggus*, 411 F. 2d 110, 113 (C.A. 9), certiorari denied, 396 U.S. 919, involving a similar unsuccessful challenge to a conviction for smuggling gold under 18 U.S.C. 545.

Petitioner also contends that it constituted cruel and unusual punishment to convict him for both the conspiracy and substantive offenses. The law in the federal courts is settled to the contrary. *Callanan* v. *United States*, 364 U.S. 587; *Pereira* v. *United States*, 347 U.S. 1, 11. At all events, although *Benton* v. *Maryland*, 395 U.S. 784, declined to recognize the concurrent sentence doctrine as a jurisdictional rule, the rule survives as a matter of judicial convenience where prejudice does not patently appear and collateral legal consequences are remote. *Kauffmann* v. *United States*, 414 F. 2d 1022 (C.A. 8), certiorari denied *sub nom. Chubet* v. *United States*, 397 U.S. 962. The alternative ruling of the court below that

the doctrine has proper application here to the concurrent conspiracy sentence was therefore correct.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1971.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 415096 474